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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1649

GEORGE WESTERBERG, Individually and on behalf of others similarly situated,

Petitioner,

vs.

THE DISTRICT COURT in and for the Second Judicial District, and the Honorable Neal Horan and the State Grand Jury,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION

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INDEX

PAGE

INTRODUCTORY STATEMENT 1

QUESTIONS PRESENTED 2

ARGUMENT IN OPPOSITION: 2

I. THE DECISION BELOW IS CORRECT 3-5

II. THERE IS NO CONFLICT OF DECISION 5-7

CONCLUSION 7

CASES

Cali v. United States, 464 F.2d 475 (1st Cir. 1972) 4,5,6

Costello v. United States, 350 U.S. 359 (1956) 3,6

Gelbard v. United States, 408 U.S. 41 (1972) 3,4,5,7

Hale v. Henkel, 201 U.S. 43 (1906) 5,6,7

Malloy v. Hogan, 378 U.S. 1 (1964) 4

Mapp v. Ohio, 367 U.S. 643 (1961) 4

People ex rel Dunbar v. District Court,—— Colo. ——, 500 P.2d 819 (1972) 1

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 5,6,7

Truchinski v. United States, 393 F.2d 627 (8th Cir. 1968), *cert. denied,* 393 U.S. 831 4

United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972) *cert. granted* February 20, 1973, No. 72-734 3,5

INDEX (Continued)

PAGE

United States v. Dionisio, —— U.S. ——, 35 L.Ed.2d 67 (1973) 5,6,7

United States v. Flood, 394 F.2d 139 (2d Cir. 1968), *cert. denied*, 393 U.S. 855 4

CONSTITUTION

United States Constitution, Fourth and Fourteenth Amendment 2

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BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

The respondents accept the petitioner's references and statements as to the opinion below,[1] jurisdiction, constitutional provisions involved, and statement of the case. However, the respondent desires to restate the questions presented.

[1] For additional background the Supreme Court is respectfully referred to the related opinion, **People ex rel Dunbar v. District Court,** —— **Colo.** ——, 500 P.2d 819 (1972).

QUESTIONS PRESENTED

1. Whether state grand jury witnesses who have been granted transactional immunity are entitled to invoke the exclusionary rule formulated under the Fourth and Fourteenth Amendments to the United States Constitution by moving to suppress wiretapping evidence obtained under authority of a court order issued pursuant to state law, before any showing that such order was invalid or that any constitutional rights have been violated?

2. Whether such state grand jury witnesses have a right of discovery prior to time that the witnesses are required to testify or risk being cited for contempt?

ARGUMENT IN OPPOSITION

The issues presented in this case are much more narrow than the questions set out above would apparently indicate. In essence we are not involved with any deprivation of constitutional rights, as intimated by petitioner, but rather at what point in time those rights are to be determined during a grand jury proceeding. In this case the state grand jury, the District Court Judge, the Colorado Supreme Court Justice who issued the surveillance order, and the Supreme Court of Colorado were all acutely sentitive to the constitutional rights of the petitioner as evidenced by their orders and opinions issued below. The issue before this Court is narrow, and in practical effect is limited to the determination of whether a motion to suppress or for discovery must be afforded a grand jury witness prior to the time that the witness either testifies or chooses to be cited for contempt. Such problem was alertly recognized by Mr. Justice White,

concurring in *Gelbard v. United States*, 408 U.S. 41 (1972), where he commented:

> "Where the Government produces a court order for interception, however, and the witness nevertheless demands a full blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and in any event, the deterrent value of excluding the evidence will be marginal at best . . . ."

The respondents submit that petitioner is not entitled to a rule which would result in interminable delay, thwart the very functioning and efficacy of the grand jury process, and yet add nothing to the assurance that petitioner's constitutional rights would be any more sensitively considered and protected than they already have been in this case. See *Costello v. United States*, 350 U.S. 359 (1956).

I. THE DECISION BELOW IS CORRECT.

The petitioner urges this Court to grant a writ of certiorari on the ground that the decision of the Supreme Court of Colorado is in conflict with an opinion of the United States Court of Appeals for the Sixth Circuit[2] on a substantially similar issue. Since the same decision

[2] **United States v. Calandra**, 465 F.2d 1218 (6th Cir. 1972), *cert. granted* February 20, 1973, No. 72-734.

of the Supreme Court of Colorado is in accord upon a more identical issue with an opinion of the United States Court of Appeals for the First Circuit,[3] it would appear that the conflict constitutes a stand-off and petitioner's request for a writ should be denied as not coming within the scope of considerations characterized within United States Supreme Court Rule 19.

However, assuming some sincerity to petitioner's reasons for urging the grant of the writ, respondents nevertheless urge denial of the writ since the decision of the Supreme Court of Colorado is correct.

This Court extended the "exclusionary rule" to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), and specifically referred to the conjunction of the Fourth and Fifth Amendments as the rationale for such exclusion in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (Brennan, J.). Here the petitioner was granted transactional immunity and it would appear that he would have no standing to assert a right of suppression since he could not become a defendant in the usual sense. However, in *Gelbard, supra*, this Supreme Court, while expressly reserving the constitutional issue here presented, held that a grand jury witness in a federal contempt proceeding may raise the defense that the questions which were propounded to him where based upon an unauthorized and illegal wiretap. The Supreme Court of Colorado, in this case below, recognized that the outside boundaries established by *Gelbard* were that "discovery" could not be withheld after contempt proceedings had been instituted against a grand jury witness. In determining the question at what point in time a grand jury witness will be afforded dis-

[3] **Cali v. United States**, 464 F.2d 475 (1st Cir. 1972). In *accord*, United States v. Flood, 394 F.2d 139 (2d Cir. 1968), *cert. denied*, 393 U.S. 855. See also, Truchinski v. United States, 393 F.2d 627, 631-34 (8th Cir. 1968), *cert. denied*, 393 U.S. 831.

covery, the court opted for the reasoning in *Cali, supra,* which concluded that the proper functioning of the grand jury must take precedence, and that whatever rights a grand jury witness may have in defense to a contempt proceeding, he may not *anticipate* such a proceeding by prematurely bringing a motion to suppress evidence before the grand jury.

Whatever merits the *Calandra, supra,* decision may have in this regard, it is emphasized that the rights of the defendant in that case were considered to have been clearly violated by an illegal search and seizure. In the case *sub judice,* the wiretap in issue was obtained only after a court order was issued pursuant to state law, and since no showing has been made that the surveillance order was invalid or not properly executed, it is presumptively valid.

Hence, the Colorado state decision is not only correct, but it is in accord with *Cali, supra,* and is distinguishable from *Calandra, supra.*

II. THE DECISION BELOW IS NOT INCONSISTENT IN PRINCIPLE WITH PREVIOUS DECISIONS OF THIS COURT.

The petitioner states that although this Court, in *Gelbard v. United States,* 408 U.S. 41 (1972), expressly refrained from reaching the constitutional issue presented by the instant case, the decision by the Supreme Court of Colorado conflicts in principle with prior decisions of this Court, citing *Hale v. Henkel,* 201 U.S. 43 (1906), *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920), and *United States v. Dionisio,* —— U.S. ——, 35 L.Ed.2d 67 (1973).

At the outset it is emphasized that unlike the case under consideration, neither *Hale, Silverthorne,* nor *Dionisio* involved witnesses who had been offered specific grants of immunity from prosecution to fully protect Fifth Amendment rights. While agreeing with such distinction, the petitioner opines that such distinction is irrelevant, indicating that it would be anomalous to say that an individual is fully protected by the Fourth Amendment only when he is suspected of or charged with criminal behavior. Such rationalization fails to appreciate the especial uniqueness of grand jury proceedings. Grand juries are generally free from technical rules, act in secret, and have extra-ordinary powers which even permit them to pierce the Fifth Amendment shield by grants of immunity from prosecution. See *Hale v. Henkel, supra,* and *Costello v. United States, supra.*

Respondents admit to the validity of the basic principle that victims of unconstitutional practices should be entitled to an effective remedy. However, in the more obviously pertinent case of *Silverthorne,* the constitutional violation was a *fait accompli* and the constitutional breach was admitted by the government. Such is not the case below; here petitioner was subject to electronic surveillance in accordance with a valid court order issued pursuant to state law, and respondents deny any illegality as to such surveillance. Hence, Justice Holmes' injunction in *Silverthorne* forbidding the use of illegally obtained evidence "not [only] before the Court, but that it shall not be used at all" (251 U.S. at 392) is not pertinent to the situation in this case since the question of illegality is *premature,* as was recognized in *Cali, supra,* and by the Supreme Court of Colorado here. This is not to say that the petitioner is to be denied his day in court to question such legality, but rather to question his timing. As in

Hale, Silverthorne, and *Dionisio,* the petitioner will be able to assert his rights and thereby be afforded a remedy during the contempt proceeding should the circumstances so evolve.

Respondents are not, and were not, insensitive to the Fourth Amendment rights of the petitioner. Their position and actions have recognized the necessity of protecting Fourth Amendment rights as they may apply to electronic surveillance of a grand jury witness, and such actions were in accord with the dictates, as differentiated from the dicta, of *Hale, Silverthorne, Dionisio,* and *Gelbard.* The Supreme Court of Colorado, in the decision at issue, concluded that to determine these rights before the grand jury investigation would frustrate the processes of that body, and further concluded that adequate protection is afforded the witness by the requirement that the court examine all the facts during the contempt proceeding.

Such procedure was evidently considered adequate protection by this Court in *Gelbard, supra,* as well as in the very cases cited by petitioner, viz. *Hale, Silverthorne,* and *Dionisio.*

Hence, the Colorado state decision below is in accord with the principles and procedures sanctioned by previous decisions of this Supreme Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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